

DOCKET FILE COPY ORIGINAL

ORIGINAL
RECEIVED

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

APR - 2 1996

In the Matter of)

Implementation of Section 302 of)
the Telecommunications Act of 1996)

Open Video Systems)

CS Docket No. 96-46

To: The Commission

Errata to
Comments of NYNEX Corporation

NYNEX Corporation submits this Errata to the Comments filed yesterday afternoon in the above-captioned proceeding. For the convenience of the Commission, attached to this Errata are revised pages containing the corrections.

In the Summary of Argument:

on page iii, change the word "operators" and "affiliates" in the first line of the fourth bullet to "operator" and "affiliate," respectively.

on page iv, change the word "system" to "systems" in the second line of the last bulleted item.

In the text of the Comments:

on page 3, insert the word "digital" between the words "switched" and "video" in the fifth line from the bottom of the page.

on page 11, revise the third from the last line on the page to read as follows:


"Requiring the OVS operator to provide capacity to the local cable company could . . ."

[Handwritten signature]

on page 16, substitute the word "channels" for the word "service" in the second line.

on pages 20 and 21, substitute Section 628 for all references to Section 638.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Donald C. Rowe", is written over a horizontal line.

Donald C. Rowe
Robert A. Lewis
NYNEX Corporation
1111 Westchester Avenue
White Plains, N.Y. 10604

Of Counsel:

Theodore D. Frank
Arent, Fox, Kintner, Plotkin & Kahn
1050 Connecticut Avenue, N.W.
Washington, D.C. 200236

Counsel for NYNEX Corporation

April 2, 1996

individual markets."⁴ It should adopt only those regulations that are essential to implement statutory requirements.

Thus, the Commission should:

- afford OVS operators maximum discretion to allocate and position channels, subject to the Act's nondiscrimination requirement.
- give OVS operators maximum flexibility with respect to the manner in which program providers are solicited, as long as the procedures employed are reasonably open to all interested participants, the criteria for participation are reasonable, and adequate public notice is given of the enrollment period and the participation requirements.
- afford OVS operators broad flexibility to design their systems, set prices for access, and impose reasonable qualifications requirements for video program providers including requirements of fair program access, provided its actions are based on *bona fide* business considerations and are not intended to discriminate against a particular entity. The OVS operator should not be required to provide capacity to the local cable operator if it determines that doing so could give the cable operator access to sensitive competitive information or otherwise undermine competition between the open video system and the incumbent local cable system.
- permit the OVS operator or its affiliate to market the programming services of unaffiliated providers along with the programming provided by the operator, with the consent of the unaffiliated provider.
- give OVS operators flexibility to determine whether to require the sharing of channels, to prescribe the terms and conditions for sharing channels, and to decide whether to delegate the administration of shared channels to a third party.
- apply the must-carry and retransmission consent rules to open video systems in the same manner as they apply to cable systems. The OVS operator should be responsible for assuring that system subscribers have access to the must-carry and PEG channels. Must-carry, and PEG channels should not be counted as channels "selected" by the OVS operator because it is required to carry them. As stated in the Act, only the PEG "channels" are required to be provided by the OVS operator, not the PEG facilities.

⁴ Notice of Proposed Rulemaking at ¶ 2.

- apply the syndicated exclusivity, network nonduplication and sports exclusivity rule to the entity which controls the programming. The OVS operator should also be responsible for compliance with syndicated exclusivity, network nonduplication and sports exclusivity requirements on the channels carrying broadcast station pursuant to the retransmission consent. With respect to programming on other channels, the entity providing the programs should be responsible for compliance with those rules.
- vigorously enforce its program access rules and extend those rules to all programming distributed by cable-affiliated entities, whether by satellite or terrestrial means.
- enforce the statutory requirement that the OVS operator not unreasonably discriminate in providing information to subscribers "for the purposes of selecting programming" as part of the general prohibition on discrimination. The statutory requirement should be interpreted as referring only to information provided on the on-screen programming menu that is used by the subscriber.
- establish a certification procedure that is swift, imposes minimal burdens on OVS operators, and does not give potential competitors or local governments a means to delay or block deployment of open video systems.
- leave OVS operators and their affiliates free to bundle and market OVS services together with telecommunications services in any way they believe is most likely to secure customers.
- adopt simple and expedited dispute resolution procedures that place both the burden of proceeding and the burden of proof on the complainant.
- make it clear that Congress has preempted state and local regulation of open video systems, except to the extent that an OVS operator is required to pay fees pursuant to Section 653(c)(2)(B).

In short, to the maximum extent consistent with the Act, the Commission should avoid adopting complex rules and restrictions that may deter local exchange carriers from making the enormous investment and taking the considerable risks that will be required to compete with entrenched cable systems. The marketplace, not the government, should decide what this new service can become.

effective immediately, all of the Commission's video dialtone rules and policies.⁵ Congress could not have made its intent any plainer.

This rejection of a Title II approach reflects Congress recognition that, in order to induce local exchange carriers and others into the video distribution business, the Commission must wield a light regulatory hand, so that new entrants will have maximum freedom in structuring their offerings. And, while the Act imposes certain obligations on OVS operators and directs the Commission to adopt regulations implementing those requirements, it also authorizes the Commission to forbear from regulation where regulation is unnecessary to achieve Congress' objectives.⁶ The Commission should exercise that discretion liberally so as to create as favorable a regulatory environment as possible for OVS entry.

Open video systems are a new frontier, and those considering entry face formidable obstacles. Open video systems have no market share and the contours of the services are largely undefined. No one yet has a firm or comprehensive picture of the technologies that will be used to deliver it, the services that will be provided, or the competitive factors that will affect its development. New technologies, such as switched digital video services and ADSL, among others, hold promise to increase the options available to customers and programmers, but their feasibility and marketability in the real world have yet to be tested.

Moreover, the companies providing this service must compete with entrenched competitors that have established program supplier relationships and established customer

⁵ Act, Section 302(b)(3). *See also* Notice at ¶¶ 74-76.

⁶ *See* Communications Act, Section 10(a).

to copyright, defamation and similar claims; assurances concerning the program provider's right to distribute the programming; standards concerning the distribution of indecent programming or programming with excessive violence; interconnection and technical standards; and other nondiscriminatory requirements cable operators may employ for commercial leased access channels.²⁶ As indicated above, the test for determining whether these requirements are "unjustly or unreasonably discriminatory" should be whether they are based on valid business considerations and permit fair access by unaffiliated programmers. The validity of such a requirement should be resolved in the dispute resolution process rather than through rules adopted in advance.

The OVS operator should not be required, however, to provide capacity to the local cable operator, although it should be free to do so if it wishes.²⁷ The legislative history of the Act makes it very clear that Congress's goal is to "introduce vigorous competition in entertainment and information markets."²⁸ It would undercut that goal to force the OVS operator to provide capacity to its principal multichannel competitor -- the cable operator. Requiring the OVS operator to provide capacity to the local cable company could also require that the OVS operator give the cable operator access to sensitive confidential information or permit the local cable company to undermine the competitiveness of the open

²⁶ See 47 C.F.R. §§ 76.970 & 76.971 (1995).

²⁷ The introductory clause of the second sentence of Section 653(a) gives the Commission discretion to determine the extent to which a cable operator or any other person may provide programming through an open video system.

²⁸ Conference Report at 178.

feasible to offer shared channels in a manner that is transparent to the subscriber, that is not the only manner in which shared channels can be offered. Moreover, given the many different possible technologies that may be used to provide OVS service, imposing a specific requirement of transparency may inhibit deployment of certain kinds of systems. Therefore, rather than attempting to refine the statutory requirement, the Commission should simply require that customers have "ready and immediate" access to shared channels, in accordance with the Act.

E. Title VI Requirements

The Commission seeks comments on the manner in which the must-carry and retransmission consent rules, the obligation to provide access for PEG channels, and the sports exclusivity, network non-duplication and syndicated exclusivity rules should apply to open video systems.⁴⁰

1. Compliance With Must-Carry, PEG, Network Nonduplication, Syndicated Exclusivity and Sports Exclusivity Requirements

The Commission solicits comments on a number of issues concerning the manner in which the must-carry, retransmission consent, PEG, network non-duplication, syndicated exclusivity and sports exclusivity rules should apply to open video systems.⁴¹ In general, the must carry and retransmission consent provisions should be applied to open video systems in the same manner as they apply to cable operators serving the same area. For example, cable systems frequently serve multiple municipalities and often cross ADI or other must-

⁴⁰ Notice at ¶ 46.

⁴¹ Notice at ¶ 46.

3. Program Access Requirements

In the Notice, the Commission alludes briefly to the program access rules and seeks comment on how those rules should apply to OVS operators and in the context of shared channels.⁴⁷ The rigorous enforcement of those rules, and the analogous rules implementing Section 616 of the Communications Act,⁴⁸ is essential to the launch of open video systems, because, as the Commission is well aware, the success or failure of any video distribution system turns ultimately on the attractiveness of its programming.

As the Commission has consistently found, cable operators and their affiliated programmers currently control the vast preponderance of video program material available to multichannel video providers.⁴⁹ Without access to those programs, OVS operators will have scant chance of success. Accordingly, the Commission must make it clear that it intends to vigorously enforce the rules adopted pursuant to Sections 616 and 628 of the Communications Act and to give OVS operators a meaningful opportunity to distribute the programming to which those rules apply.

While vigorous enforcement of those rules will go a long way towards making desirable programming available to OVS operators and other program providers using the open video system, the program access rules under Section 628 apply only to satellite-distributed programming, not to programming distributed by cable-affiliated entities using

⁴⁷ Notice at ¶ 61.

⁴⁸ 47 U.S.C. § 536.

⁴⁹ See, e.g., *Second Annual Report* at ¶¶ 149-56.

terrestrial systems, such as microwave or fiber optic systems. That limitation creates a potentially huge loophole, permitting cable operators and their affiliated program suppliers to monopolize the distribution of valuable programming and limit competition by start-up multichannel video providers.

As the legislative history of the 1992 Cable Act makes clear, Congress adopted Sections 616 and 628 to enhance the ability of unaffiliated cable systems and independent program producers to acquire and market their programming.⁵⁰ In order to fulfill that objective, the Commission should extend the program access requirements to all program distributors affiliated with a cable system or other multichannel video programmer.⁵¹

Without assurance of access to non-satellite distributed programming -- much of it regional sports programming important to the success of open video systems -- local exchange carriers will be hesitant to take on the competitive challenge of open video systems.

⁵⁰ See S. Rep. No 92, 102d Cong., 2d Sess. 24-29 (1992); H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 82-83 (1992).

⁵¹ The legislative history does not contain any insight into Congress's reasons for limiting Section 628 to satellite-delivered programming. To the contrary, the Senate and Conference Reports both reflect a concern over the domination of programming by cable-affiliated entities, without any consideration as to whether the programming was distributed by satellite or by other means. *Id.* In fact, Congress was dealing with a specific problem facing the industry -- the control of satellite distributed programming by cable affiliates -- and only addressed that issue. As such, there is nothing in the 1992 Cable Act that would preclude the Commission from extending its rules to non-satellite delivered programming where, as here, facilitating access to that programming is essential to achieving Congress's goal of stimulating entry by a competitive multichannel video provider.